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Due Process and Sentencing: Third Circuit Holds That Plea of Guilt Waives Fifth Amendment Privilege

I. Introduction

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, mandates that “[n]o person . . . shall be compelled to be a witness against himself.”¹ Judicial interpretation has consistently afforded the Amendment’s privilege against self-incrimination generous latitude.² In accordance with this principle, an abundance of case law exists indicating the extent to which this privilege applies in the custody, interrogation, and trial of a defendant in a criminal action.³

In 1984, however, Congress gave the constitutional makeup of the criminal trial a facelift by passing the Sentencing Reform Act (hereinafter “the Act”).⁴ The Act dramatically altered the structure of criminal actions in its promulgation of sentencing guidelines for convicted defendants.⁵ In doing so, the Act created a separate inquiry for purposes of sentencing, requiring the kind of

1. U.S. CONST. amend V; see also *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the self-incrimination privilege of the Fifth Amendment applies to the states through the Fourteenth Amendment).

2. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[T]he Fifth Amendment privilege . . . serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”).

3. See, e.g., *id.*; *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *United States v. Kahn*, 728 F.2d 676, 678 (5th Cir. 1984), *cert. denied*, 502 U.S. 809 (1991).

4. Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (1984) (codified principally at 18 U.S.C. §§ 3551-3673 and 28 U.S.C. §§ 991-998 (1988)).

5. See generally Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1247 (1997). Indeed, “[T]he federal judge in today’s sentencing ritual has little or no opportunity to consider the overall culpability of the defendant before him. The Guidelines themselves determine not only which factors are relevant (and irrelevant) to criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor.” *Id.* at 1254. Whereas in the past judges exercised discretion in sentencing, “[T]he Guidelines require judges to address many quantitative and definitional issues in excruciating detail, while staying away from larger questions relating to culpability and the process of criminal punishment.” *Id.* at 1256.

fact finding inherent in any normal trial.⁶ Consequently, where the Act was intended to create uniformity of sentencing, it has had the opposite effect on judicial interpretation of the constitutional rights available during the sentencing process.⁷

Specifically, as this Comment will address, the issue of whether a convicted defendant retains the right to invoke the Fifth Amendment at the sentencing stage of the proceeding has resulted in conflicting viewpoints. Two recent cases with substantially similar facts, *United States v. Mitchell*⁸ and *United States v. Garcia*,⁹ exemplify this conflict, and are the focus of this Comment. In *Mitchell*, the Third Circuit held that a voluntary plea of guilt unaccompanied by a plea agreement constituted a waiver of the Fifth Amendment privilege at sentencing.¹⁰ Previously, the Tenth Circuit had held in *Garcia* that the privilege extended beyond trial and into the sentencing phase of the proceeding, even when the defendant pleaded guilty.¹¹

The Third Circuit's opinion ignores the fact-finding nature of the sentencing hearing which is stipulated by the Act,¹² where co-conspirators become witnesses against the accused in an effort by the government to increase the defendants level of culpability. The sentencing hearing is still a part of the overall case in which the safeguards of the Fifth Amendment still apply. Consequently, due process is only secure when the criminal defendant's failure to testify at sentencing is not determinative of his or her sentence.

This Comment takes the position that the Fifth Amendment's privilege against self-incrimination must extend to the sentencing phase of criminal proceedings, particularly when a plea of guilt has been entered, and in light of the rigorous evidentiary requirements under the Act. Part II of this Comment discusses the Act, its purpose, and how it has changed the significance of the sentencing process through its sentencing guidelines. Part III analyzes the

6. See *id.* at 1266. "[T]he sheer number of factual issues made relevant by the Guidelines is extraordinary. There are literally hundreds upon hundreds of definitional terms and factual specifications that sentencing courts may be forced to apply, and about which appellate courts must generate innumerable, dense opinions." *Id.*

7. See Maurita Elaine Horn, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. CHI. L. REV. 225, 237 (1994).

8. 122 F.3d 85 (3d Cir. 1997).

9. 78 F.3d 1457 (10th Cir. 1996).

10. See *Mitchell*, 122 F.3d at 191.

11. See *Garcia*, 78 F.3d at 1463.

12. See 18 U.S.C. §§ 3551-3673 and 28 U.S.C. §§ 991-998 (1988).

Tenth Circuit's opinion in *Garcia*, and how it is consistent with the purpose of the Fifth Amendment and prior case law. Part IV explains how the Third Circuit's opinion in *Mitchell* curtails the fundamental rights of defendants and illustrates the adverse consequences of denying the Fifth Amendment privilege at sentencing. Finally, part V analyzes whether disallowing the Fifth Amendment privilege at sentencing constitutes a penalty that violates due process.

II. Changes Brought By the Sentencing Reform Act

The Sentencing Reform Act of 1984¹³ was passed in an effort to provide more consistency and standardization in sentences being imposed by courts.¹⁴ The Act created the United States Sentencing Commission ("Sentencing Commission")¹⁵ and empowered it with the authority to promulgate uniform federal sentencing guidelines ("Guidelines").¹⁶ The goals of the Act were to promote honesty, reasonable uniformity, and proportionality in the federal sentencing procedure.¹⁷ The idea was to "reduce the existing sentencing disparities yet allow sentencing judges a certain measure of flexibility to compensate for individual circumstances."¹⁸ However, the Act's real impact has been to convert the standard of sentencing process into an in-depth analysis of the defendant's level of guilt.¹⁹

This effect is chiefly the result of the promulgated Guidelines, which provide a formulaic approach to determining how a particular defendant will be sentenced.²⁰ For example, using the facts of *Mitchell*, distribution of five kilograms of cocaine carries with it,

13. 18 U.S.C. §§ 3551-3673 and 28 U.S.C. §§ 991-998.

14. See Ellen M. Bryant, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269, 1270 (1995).

15. See *id.* at 1305. "The Sentencing Commission is an independent body of the judicial branch charged with the discretion to promulgate sentencing guidelines under 28 U.S.C. § 991 (1988)." *Id.* at 1270 n.11.

16. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1990).

17. See David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382, 386 (1992). The Guidelines were created to "increase uniformity in sentencing by narrowing the range of possible sentences while providing appropriate proportional sentencing for various criminal conduct." Bryant, *supra* note 15, at 1272.

18. Hoffman, *supra* note 18, at 387.

19. See *id.*

20. See Bryant, *supra* note 15, at 1271 ("The Guidelines include a grid system that sets out the recommended minimum and maximum sentencing range for various criminal conduct and criminal history.").

among other things,²¹ a mandatory minimum sentence of ten years of imprisonment, with a potential maximum life sentence.²² Judicial discretion in handing down a sentence is thus severely limited by application of the Guidelines. Prior to the passage of the Act, however, a judge exercised absolute discretion in deciding how an individual would be sentenced.²³ In making this determination, judges relied on various factors, including the presentence report prepared by a probation officer, as well as any leniency arguments put forth by the defense.²⁴

With the implementation of the Guidelines, however, judges have been reduced to arbiters in an inquiry designed to elicit a number to plug in for determination of sentencing.²⁵ The discretion previously enjoyed by the judge has been replaced by what amounts to nothing more than a matrix of numbers, in which the judge simply assigns the corresponding length of sentence mandated by the Guidelines. Consequently, "judges must conduct specific factual determinations that have specified sentence departures connected with them."²⁶ As a result, the sentencing procedure has evolved into a "mini-trial" that has tremendous due process implications and "significantly affect[s] a defendant's liberty interests."²⁷ For this reason, the Tenth Circuit held in *Garcia* that retention of one's privilege against self-incrimination at sentencing is a due process safeguard that cannot be waived.²⁸

21. According to 21 U.S.C. § 841, entitled "Prohibited acts A," the penalties for intentionally possessing or distributing up to five kilograms of cocaine are "a term of imprisonment which may not be less than 10 years or more than life," as well as a potential fine not in excess of \$10,000,000. *Id.* § 841(b) (1988). This presumes that the defendant has not previously been convicted for a violation of § 841, and also that there was no death or serious bodily injury resulting from the use of a controlled substance, in which the case the penalties are doubled. *See id.*

22. *See United States v. Mitchell*, 122 F.3d 85, 86 (3d Cir. 1997); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1990) (setting forth the mandatory minimum and maximum sentences associated with various crimes).

23. *See Stith & Cabranes, supra* note 5, at 1248.

24. *See id.* at 1249-50.

25. *See id.* at 1255. "The judge's role is largely limited to factual determinations and rudimentary arithmetic operations. Moreover, the Sentencing Commission has taken pains to limit sharply the judge's authority to depart from the sentencing range that these arithmetic calculations yield." *Id.*

26. Hoffman, *supra* note 18, at 416.

27. *Id.*

28. *See United States v. Garcia*, 78 F.3d 1457, 1463 (10th Cir. 1996).

III. *United States v. Garcia*

A. *Facts and Procedural History of Garcia*

Garcia was the first case following the implementation of the Guidelines to specifically address the issue of whether a defendant who pleaded guilty at trial preserves his or her right to invoke the privilege against self-incrimination at sentencing.²⁹ In *Garcia*, the Court of Appeals for the Tenth Circuit held that the defendant, who pleaded guilty to the distribution of cocaine, did not thereby waive his right against self-incrimination at sentencing.³⁰ The relevant facts are as follows.

Following a grand jury indictment on charges for drug trafficking,³¹ defendant Jose A. Garcia signed a plea agreement in which he agreed to plead guilty to distribution of cocaine.³² Garcia's plea exposed him to a potential maximum twenty year jail sentence.³³ Such a threshold was reached based on the distribution of between 100 and 500 grams of cocaine.³⁴

During the preparation of the presentence report, the probation officer discovered that Garcia not only distributed more cocaine than he had admitted in his plea, but had also been more instrumental in the drug operation.³⁵ Based upon this new information, the probation officer stated in her report that, according to the Guidelines, the amount of drugs involved elevated the maximum penalty to forty years in jail, with a five year mandatory minimum sentence.³⁶

The lower court then conducted sentencing hearings to "address the discrepancy between the quantities stipulated to by the parties and the quantities estimated in the presentence report."³⁷ The court stated that if, after the submission of the evidence, it found that Garcia had distributed more than the five

29. *See id.*

30. *See id.*

31. *See id.* at 1460. Count 1 was the conspiracy to distribute cocaine and marijuana, and Count 5 was solely the distribution of cocaine. *See id.*

32. *See id.*

33. *See Garcia*, 78 F.3d at 1460.

34. *See id.*

35. *See id.*

36. *See id.*

37. *Id.* at 1461. The actual amount of cocaine involved was stipulated by the parties to be 96.95 grams. *See id.*

hundred gram threshold enumerated in the plea agreement, it would allow Garcia to withdraw his plea.³⁸ At subsequent hearing, Garcia did not testify to refute the evidence being presented against him, which the court on several occasions noted.³⁹ At the conclusion of the hearing, the court stated that, while the Fifth Amendment usually protects a defendant from having to testify on his own behalf, such protection had been waived when Garcia pleaded guilty to the offense.⁴⁰

Thus, in concluding that Garcia was involved in the distribution of four hundred and ninety-nine grams of cocaine, the court relied not only on the testimony of informants,⁴¹ but also on the fact that Garcia refused to testify on his own behalf.⁴² The district court found that with regard to any inquiry into acts incident to the distribution of cocaine, Garcia's plea of guilt precluded the assertion of the Fifth Amendment privilege.⁴³ Consequently, the court found Garcia to have been involved in the distribution of four hundred and ninety nine grams of cocaine, whereupon Garcia appealed to the Tenth Circuit.⁴⁴

B. The Tenth Circuit's Analysis

The Tenth Circuit did not agree with the district court's view on the issue of waiver, particularly given the fact that Garcia's testimony may "have enhanced further his offense level for sentencing purposes."⁴⁵ The relevant inquiry, according to the court of appeals, was not where or when the privilege was being invoked, but rather the potential harm the testimony may inflict on a defendant's due process rights.⁴⁶ Very simply, the Tenth Circuit

38. *See Garcia*, 78 F.3d at 1461 n.2.

39. *See id.* at 1463.

40. *See id.*

41. *See id.* at 1461. The two informants were FBI agents and their testimony reflected Garcia's involvement in the distribution of cocaine, including the amount they received from him as alleged buyers. *See id.*

42. *See id.* Specifically, the district court stated that "[i]t was interesting to this court on the subject of quantities here that the defendant never got on the witness stand and under oath denied the testimony of either [the informants], although he had every opportunity to do so, and certainly in those limited areas of role in the offense, quantity of drugs, and guns, the Fifth Amendment is in no way implicated in this case." *Id.*

43. *See Garcia*, 78 F.3d at 1463.

44. *See id.* at 1461.

45. *Id.* at 1463 n.8.

46. *See id.* at 1463. The court stated that "the availability of the privilege does not turn on the type of proceeding in which its protection is invoked, but upon the nature of the

was of the opinion that the testimony Garcia was requested to give during sentencing "could have subjected him to further criminal liability."⁴⁷ In fact, the court spent little time and effort in dealing with the Fifth Amendment claim, mainly because of the clarity of Supreme Court precedent on this issue provided by *Application of Gault*⁴⁸ and *Estelle v. Smith*.⁴⁹

Gault, a 1967 decision, held that the Fifth Amendment's protection extended specifically into the sentencing phase of a criminal trial.⁵⁰ In addition, *Gault* suggests that the concern over the applicability of the Fifth Amendment is not how it can be waived, but rather, how it applies.⁵¹ In other words, the privilege should not be viewed as an exception to the rule, but as the rule itself.⁵²

More compelling is the landmark case of *Estelle v. Smith*, in which the Supreme Court held that the Fifth Amendment extended unconditionally into the sentencing phase of a capital murder trial.⁵³ In *Estelle*, the issue was whether the use of a psychiatric evaluation as testimony at sentencing violated the defendant's Fifth Amendment rights.⁵⁴ Although the *Estelle* decision was rendered prior to the passage of the Sentencing Reform Act, it is analogous to current federal procedure under the Guidelines, and thus is applicable here. This is because *Estelle* was subject to Texas criminal law, which mandated that a capital trial be bifurcated into guilt and sentencing phases.⁵⁵

In *Estelle*, the original sentence handed down by the state trial court was vacated on appeal.⁵⁶ The United States District Court

statement and exposure it invites." *Id.* (citing *United States v. Rogers*, 921 F.2d 975, 979 (10th Cir. 1990)); see also *United States v. Jones*, 640 F.2d 284, 287 (10th Cir. 1981) ("[t]here is no question but that the Fifth Amendment does offer protection in the sentencing process.").

47. *Garcia*, 78 F.3d at 1463.

48. 387 U.S. 1 (1967). The Court in *Gault* held that "[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . [and] it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." *Id.* at 47-48 (citing *Murphy v. Waterfront Commission*, 378 U.S. 52, 94 (1964)).

49. 451 U.S. 454 (1981).

50. See *Gault*, 387 U.S. at 47-48; see also *Jones*, 640 F.2d at 287.

51. See *Gault*, 387 U.S. at 48.

52. See *id.*

53. See *Estelle*, 451 U.S. at 462-63.

54. See *id.* at 460.

55. See *id.*

56. See *Smith v. Estelle*, 445 F. Supp. 647, 662 (N.D. Tex. 1977).

for the Northern District of Texas held that the trial court's failure to advise the defendant of his right to remain silent at the pretrial psychiatric examination contravened the principles of the Fifth Amendment.⁵⁷ The court further stated that "the failure to notify defense counsel in advance of the penalty phase that [the psychiatrist] would testify" impinged upon the defendant's due process rights.⁵⁸ This decision was affirmed by The Fifth Circuit.⁵⁹

On appeal to the Supreme Court, the state argued that defendant Smith was not entitled to the protection of the Fifth Amendment during sentencing because he had already been found guilty.⁶⁰ However, the Court rejected the state's contention that "incrimination is complete once guilt has been adjudicated,"⁶¹ and flatly dismissed the notion that the Fifth Amendment was not available in the penalty phase of a capital murder trial.⁶² The Court stated that it could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment is concerned."⁶³

Although the severity of a potential death sentence was certainly a factor in the Court's decision,⁶⁴ nowhere in its opinion did the Court state that this rule should be limited solely to capital cases.⁶⁵ To the contrary, the holding in *Estelle* has subsequently been extended beyond the confines of a capital murder trial.⁶⁶ Specifically, in *Finney v. Rothgerber*, the Sixth Circuit held that neither the severity of the crime nor the gravity of the sentence

57. *See id.*

58. *Id.* at 657.

59. *See Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979).

60. *See Estelle v. Smith*, 451 U.S. 454, 462 (1981).

61. *Id.*

62. *See id.* "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Id.* at 462 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-582 (1961)).

63. *Id.* at 462-63.

64. *See id.* at 463. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Id.*

65. *See Estelle*, 451 U.S. at 462-63. "Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.*

66. *See Finney v. Rothgerber*, 751 F.2d 858 (6th Cir. 1985) (involving a habeas corpus proceeding following a felony conviction for theft of property). What seems even more significant is the absence of federal case law restricting this holding to capital trials.

should influence the applicability of the privilege.⁶⁷ In addition, the Tenth Circuit itself previously held that there was no doubt that the Fifth Amendment was a constitutional safeguard of the sentencing process,⁶⁸ and that the critical issue was the potentially incriminating testimony itself, not where or when such testimony was elicited.⁶⁹ In fact, prior to *Mitchell*, no federal court restricted the *Estelle* holding to capital trials.

Finally, several courts have held that the nature of the determination of guilt should not affect the status of the privilege.⁷⁰ For example, the Circuit Court for the District of Columbia in *United States v. Lugg*⁷¹ held that even when the defendant pleaded guilty to the crime, the Fifth Amendment privilege could still be invoked at sentencing.⁷² Further, the Supreme Court of Idaho held in *State v. Wilkins*⁷³ that the holding in *Estelle* was equally applicable at sentencing following a guilty verdict or a plea of guilt.⁷⁴ The Tenth Circuit's opinion in *Garcia* was consonant with existing authority; the Third Circuit, on the other hand, in addressing the same issue, dismissed this precedent as lacking foundation.

IV. A Split Occurs: *United States v. Mitchell*

On September 9, 1997, the United States Court of Appeals for the Third Circuit decided *United States v. Mitchell*,⁷⁵ thereby

67. See *id.* at 863. "It can be argued that *Estelle v. Smith* should be applied only to the punishment phase of capital cases, in view of the emphasis the Court placed on that feature of the case . . . [However] . . . we do not believe this emphasis is significant. In many respects, the enhancement phase of a persistent felony offender proceeding is a new and separate trial." *Id.*

68. See *United States v. Rogers*, 921 F.2d 975, 979 (10th Cir. 1990).

69. See *United States v. Jones*, 640 F.2d 284, 287 (10th Cir. 1981).

70. See, e.g., *United States v. Lugg*, 892 F.2d 101 (D.C. Cir. 1989); see also *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987) (citing *United States v. Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985) (noting that it is well established that "[a] convicted but unsentenced defendant retains his Fifth Amendment rights."); *United States v. Tindle*, 808 F.2d 319, 325 (4th Cir. 1986); *United States v. Domenech*, 476 F.2d 1229, 1233 (2d Cir. 1973).

71. 892 F.2d 101 (D.C. Cir. 1989).

72. See *id.* at 102-03. The court in *Lugg* distinguished a witness who has pleaded guilty but not yet sentenced with one who has already been through the sentencing process, as was the case in *United States v. Pardo*, 636 F.2d 535 (D.C. Cir. 1980). In *Pardo*, the court found that since the witness had already been sentenced, the Fifth Amendment was no longer applicable. See *id.* at 543.

73. 868 P.2d 1231 (Idaho 1994).

74. See *id.* at 1234.

75. 122 F.3d 185 (3d Cir. 1997).

causing a split in the circuits that could be reconciled only by the Supreme Court.⁷⁶ In *Mitchell*, the Third Circuit held that the defendant's plea of guilt constituted a waiver of her privilege against self-incrimination, in direct contravention to the opinion of the Tenth Circuit rendered one year and a half prior.⁷⁷

A. *The Facts of Mitchell*

On October 16, 1995, Amanda Mitchell entered an open plea of guilt to conspiracy to distribute cocaine, leaving the actual amount for determination at sentencing.⁷⁸ Nonetheless, Count I charged Mitchell with conspiracy to distribute five or more kilograms of cocaine, a charge that carried with it a mandatory minimum jail sentence of ten years up to a maximum of life imprisonment.⁷⁹ Prior to entering her pleas, the court informed Mitchell of the potential range of punishment she would be subject to according to the plea.⁸⁰ The court further explained to Mitchell that she "would be waiving her rights by pleading guilty, including specifically her Fifth Amendment right not to testify."⁸¹ Mitchell then entered her open plea of guilt before the court.⁸²

Thereafter, beginning in January 1996, nine of Mitchell's co-conspirators were tried on similar charges.⁸³ During this trial, co-conspirator Richard Thompson, "who had pled guilty and agreed to cooperate with the government," offered testimony as to the extent of Mitchell's involvement with the distribution of cocaine.⁸⁴ Specifically, Thompson stated that Mitchell had "received a one and a half ounce bag of cocaine to sell two to three times per week," and that Mitchell sold at this rate through December 1993.⁸⁵

76. Steven Morley, who has represented Amanda Mitchell since her indictment, stated that he filed a petition for certiorari to the Supreme Court within thirty days of the Third Circuit's opinion. Telephone Interview with Steven A. Morley, Esq., attorney for Defendant Amanda Mitchell (Feb. 2, 1998).

77. See *Mitchell*, 122 F.3d at 191.

78. See *id.* at 186.

79. See *id.*

80. See *id.*

81. *Id.* at 187.

82. See *Mitchell*, 122 F.3d at 187.

83. See *id.*

84. See *id.*

85. See *id.*

As a result of this testimony, the government called Thompson as a witness at Mitchell's sentencing hearing on July 2, 1996.⁸⁶ At the sentencing hearing, Thompson repeated his testimony from his trial, and further indicated that, while Mitchell was only working two to three times per week from April 1992 to August 1992, she worked three to five times a week thereafter until December 1993.⁸⁷ According to Thompson, on each day of "work," Mitchell would sell one and a half to two ounces of cocaine.⁸⁸ Furthermore, Thompson alleged that for the first three months of 1994, Mitchell was in charge of distribution.⁸⁹ This testimony pushed Mitchell well above the five kilogram threshold on which her plea was based, implicating her in as much as thirteen kilograms of distribution, thereby doubling the range of her potential sentence.⁹⁰

B. The District Court's Analysis

As a result of Thompson's testimony, Judge Edward C. Cahn, who presided over both the trial and sentencing phases of the proceeding, stated that Mitchell should be compelled to testify to defend these accusations in order to preserve the sentencing parameters set forth in the plea agreement.⁹¹ Judge Cahn believed that, by virtue of Mitchell's plea of guilt, Mitchell had waived her privilege against self-incrimination.⁹² Consequently, he held against her the failure to testify.⁹³ Mitchell was then sentenced according to the Guidelines for distribution of approximately thirteen kilograms of cocaine, translating into a minimum ten year jail term and six years of probation.⁹⁴

The discourse between the bench and the attorneys at sentencing clearly demonstrates Judge Cahn's uncertainty regarding the issue of waiver for purposes of sentencing.⁹⁵ Even after deciding that Mitchell had waived her right to remain silent by pleading guilty, Judge Cahn called a sidebar to further discuss the

86. *See id.*

87. *See Mitchell*, 122 F.3d at 187.

88. *See id.*

89. *See id.*

90. *See id.* at 188.

91. *See id.*

92. *See Mitchell*, 122 F.3d at 188.

93. *See id.*

94. *See id.*

95. *See id.*

implications of that holding.⁹⁶ During the sidebar, Judge Cahn admitted that he was not clear on whether the Fifth Amendment was actually waived by a plea of guilt, stating that if he was incorrect in his presumption, then he would reconsider the sentence.⁹⁷ After Judge Cahn delivered the sentence, Amanda Mitchell appealed to the Third Circuit.

C. *The Third Circuit Affirms*

The Third Circuit began its analysis of the Fifth Amendment claim put forth by Mitchell's attorney by acknowledging the right of a defendant to refuse to testify at trial.⁹⁸ Mitchell's attorney argued that Mitchell's Fifth Amendment rights remained intact because Mitchell intended to contest at sentencing the amount of cocaine she allegedly sold.⁹⁹ The substance of the court's reasoning in affirming the trial court's sentence was based on the belief that Mitchell's testimony could not incriminate her because she had already pleaded guilty.¹⁰⁰ Because there was no dispute about Mitchell's notice of the consequences of her plea of guilt, the Third Circuit believed that Mitchell "voluntarily and knowingly" waived her Fifth Amendment privilege.¹⁰¹

The Third Circuit then turned to its own precedent, specifically its 1991 decision in *United States v. Frierson*.¹⁰² In *Frierson*, the defendant pleaded guilty to bank robbery by intimidation, but refused to admit to the charge of armed robbery.¹⁰³ Following an evidentiary hearing at which Frierson refused to testify, the district

96. See *id.* Judge Cahn stated that "Well, if I'm wrong—and let the record—you may want to take that up because I believe that under—once she pleads guilty, it's my understanding—or am I wrong in that . . . ?" *Id.*

97. See *Mitchell*, 122 F.3d at 188. Judge Cahn continued, stating: "And let's get that tested. If I'm wrong, surely we'll have her resentenced." *Id.*

98. See *id.* at 188-89. Mr. Morley indicated that the open plea resulted from a dispute between Morley and the government over nearly four kilograms of cocaine. Telephone Interview with Steven A. Morley, Esq., attorney for Defendant Amanda Mitchell (Feb. 2, 1998).

99. See *Mitchell*, 122 F.3d at 191.

100. See *id.* at 189. "If a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege." *Id.* Further, "if the criminality has already been taken away, the amendment ceases to apply." *Id.* (quoting *Ullmann v. United States*, 350 U.S. 422, 431 (1956)).

101. See *id.*

102. 945 F.2d 650 (3d Cir. 1991).

103. See *id.* at 653. Defendant Frierson admitted that he handed the bank teller a note that said "Give me your money, I have a gun," but refused to admit that he actually possessed a gun at that time. See *id.*

court concluded that Frierson had indeed possessed a gun and denied him a sentence reduction as a consequence of his failure to admit it.¹⁰⁴ On appeal, the Third Circuit held that a defendant who pleads guilty to the offense “waives his privilege as to the acts constituting” that offense.¹⁰⁵

Mitchell also cited the *Frierson* decision, as well as two other Third Circuit opinions: *United States v. Garcia*¹⁰⁶ and *United States v. Heubel*.¹⁰⁷ In *Heubel*, the Third Circuit found that a sentencing court could not penalize a defendant in deciding the appropriate sentence when the defendant invoked his privilege against self-incrimination.¹⁰⁸ In fact, this simply reaffirmed the holding in *Garcia*.¹⁰⁹ Mitchell’s reliance on *Frierson* due to the fact that the court there maintained that “a denied reduction in sentence is a penalty” under the Fifth Amendment.¹¹⁰ Notwithstanding, Frierson’s denial of sentence reduction was affirmed due to his failure to assert the Fifth Amendment privilege at the appropriate time, namely, before voluntarily offering the incriminating evidence.¹¹¹

Although these cases appeared to be consistent with the circumstances similar to those in *Mitchell*, the Third Circuit distinguished them¹¹² since they involved the applicability of the Fifth Amendment privilege as it pertained to crimes beyond those enumerated in the plea agreement.¹¹³ The court believed that the critical distinguishing factor between *Mitchell* and this precedent was the exposure those defendants had to the “risk of prosecution on other offenses.”¹¹⁴ According to the court, Mitchell’s situation was outside of such precedent because the only risk to which she exposed herself by testifying was a heavier sentence and not

104. *See id.*

105. *Id.* at 656.

106. 544 F.2d 681 (3d Cir. 1976).

107. 864 F.2d 1104 (3d Cir. 1989).

108. *See id.* at 1111.

109. *See id.*

110. *Frierson*, 945 F.2d at 660.

111. *See id.* at 661.

112. *See United States v. Mitchell*, 122 F.3d 185, 190 (3d Cir. 1997).

113. *See id.*

114. *Id.* “The issue has most frequently arisen when one of several defendants seeks to elicit testimony from one or more of his co-defendants who have pled guilty but have not yet been sentenced. The courts have generally permitted the unwilling witness to assert the Fifth Amendment privilege” *Id.*

conviction for an additional crime.¹¹⁵ Consequently, an open plea that reserved the right to determine the amount of cocaine involved at sentencing compelled the same analysis used in *Frierson*.¹¹⁶ Once conviction for the offense has occurred, the Fifth Amendment privilege is lost because the defendant no longer is in jeopardy of incriminating himself or herself.¹¹⁷

Additionally, although the requirements of the Sentencing Guidelines dictate a trial-like atmosphere at sentencing, the court stated that this context did not automatically confer upon the defendant the Fifth Amendment privilege.¹¹⁸ Specifically, the court was concerned with sacrificing the integrity of the sentencing stage by breaking it down to its component parts simply to allow a defendant to "retain the privilege against self-incrimination."¹¹⁹ As a result, the *Mitchell* court agreed "with the suggestion in *Frierson* that the privilege against self-incrimination is not implicated by testimony affecting the level of the sentence."¹²⁰

D. Problems with the Decision

An initial examination of the Third Circuit's reliance on *Frierson* reveals several flaws in the court's analysis. First, *Frierson* seems to stand only for the notion that the Fifth Amendment privilege remains intact only if the defendant affirmatively invokes it, as Amanda Mitchell indeed did.¹²¹ Second, the Third Circuit in *Mitchell* acknowledged that it based its rationale on a footnote in the *Frierson* opinion.¹²² However, the Third Circuit failed to

115. See *id.*

116. See *id.* at 191.

117. See *Mitchell*, 122 F.3d at 191 (stating that such a notion would "contravene the established principle that upon conviction, 'criminality ceases; and with criminality the privilege.'") (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2279 (James H. Chadbourne, ed., Little, Brown and Co.) (1961)).

118. See *id.*

119. *Id.* "Whether the defendant used a gun or had responsibility for more than five kilograms of cocaine is not an issue of independent criminality to which the Fifth Amendment applies in sentencing." *Id.*

120. *Id.*

121. See *id.* at 189. The *Mitchell* court even states that *Frierson* was properly denied the sentence reduction not because it was not a penalty, but because *Frierson* had failed to claim the privilege. See *id.*

122. See *Mitchell*, 122 F.3d at 191. The footnote to which the court refers states that "the Fifth Amendment privilege is not implicated when a defendant is asked to talk about the crime to which he has pled guilty and about his or her attitude concerning that crime." *United States v. Frierson*, 945 F.2d 650, 656 n.2 (3d Cir. 1991). The court went on to state:

include the critical language that appeared just lines down the page in the body of the *Frierson* opinion.¹²³ The issue for resolution in that case was “whether a guilty plea waives the privilege with respect to conduct that is not *necessary to the offense of conviction* but was a part of the same episode or transaction.”¹²⁴ Consequently, the privilege is waived with respect only to testimony concerning an element of the crime of conviction or testimony that could undo the conviction. At sentencing, guilt is no longer an issue, only the level of guilt. It follows, then, that if testimony that could subject one to further criminal liability is protected by the Fifth Amendment,¹²⁵ and only testimony that is “necessary to the offense of conviction” is exempted from such protection,¹²⁶ then the Fifth Amendment is most vital when inquiring at sentencing into the level of culpability of a particular defendant. Prior Third Circuit caselaw supports this contention.

For instance, in *United States v. Yurasovich*¹²⁷ the Third Circuit stated that one of the rationales for extending the Fifth Amendment privilege beyond the admission of the crime was the fear that a defendant when asked about conduct relating to the crime of conviction would increase his exposure to conviction for another crime beyond any exposure created by the plea itself.¹²⁸ Under a strict application of the Guidelines, any additional amount of contraband added to the charge in effect constitutes another crime because it exposes the defendant to a longer term of imprisonment.¹²⁹ The *Mitchell* court even conceded that an increased sentence is indeed a penalty, and that it would be difficult

[A]lthough there may be many components to be considered in computing the sentence [under the guidelines], one cannot logically fragment the sentencing process for this purpose and retain the privilege against self-incrimination as to one or more of the components Thus we agree with the suggestion in *Frierson* that the privilege against self-incrimination is not implicated by testimony affecting the level of sentence.

Mitchell, 122 F.3d at 191 (citing *Frierson*, 945 F.2d at 656 n.2).

123. See *Frierson*, 945 F.2d at 657.

124. *Id.* (emphasis added).

125. See *United States v. Garcia*, 78 F.3d 1457, 1463 (10th Cir. 1996).

126. *Frierson*, 945 F.2d at 657.

127. 580 F.2d 1212 (3d Cir. 1978).

128. See *id.* at 1217-19.

129. See *Frierson*, 945 F.2d. at 656. The court found that “[a]n investigative interview with an FBI agent, a presentence interview with a probation officer, and a sentencing hearing before a court are all proceedings in which the privilege may be claimed.” *Id.*

to imagine another way to characterize it.¹³⁰ Thus, the penalty analysis put forth in the *Heubel* and *Garcia* opinions were directly relevant to the *Mitchell* case, and should have been given greater consideration by the court.

Nevertheless, the *Mitchell* court dismissed *Heubel* as inapplicable to the issue before it.¹³¹ However, in addition to setting out the parameters under which a defendant could claim the Fifth Amendment privilege, the *Heubel* court also held that a sentencing hearing before a court is a proceeding in which the privilege may be asserted.¹³² Furthermore, the court in *Frierson* maintained that the Fifth Amendment privilege remains intact after a guilty plea when the plea involves subsequent questioning regarding an additional crime, which in *Frierson* was the existence of the gun for use in the robbing of the bank.¹³³

The bottom line is that the Third Circuit's holding that a plea of guilt waives a defendant's rights to the privilege against self-incrimination lacks merit. In fact, the court ignored mandatory precedent to the contrary.¹³⁴ The Supreme Court has specifically held that the Fifth Amendment cannot be waived by a plea of guilt, and that the privilege extends into sentencing.¹³⁵ It is well settled that the "[t]he Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard.'"¹³⁶ Furthermore, the Third Circuit itself has stated that "when faced with a conflict between two principles of law, one of which is embodied in statute and tradition, and the other of which is embodied in the Constitution, that which is in the Constitution must hold sway."¹³⁷

130. See *United States v. Mitchell*, 122 F.3d 185, 191 (3d Cir. 1997) ("The sentence is the penalty for the very crime of conviction.").

131. See *id.* at 189.

132. See *id.* at 190 (stating that "a defendant's plea of guilt to one offense does not 'by its own force . . . waive a privilege with respect to other alleged transgressions . . .'" (quoting *United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1991))).

133. See *Frierson*, 945 F.2d at 657; see also *Yurasovich*, 580 F.2d at 1218 (noting the idea that a defendant subjected to questioning by the state retains the ability to assert the Fifth Amendment privilege if a response concerning conduct would increase exposure to conviction for another crime beyond exposure created by the plea itself).

134. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981).

135. See *Estelle*, 451 U.S. at 467.

136. *Id.* at 467-68 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

137. *United States v. Heubel*, 864 F.2d 1104, 1111 (3d Cir. 1989).

Many of the problems with the court's opinion in *Mitchell* are enumerated in the concurring opinion written by Judge Michel.¹³⁸ Although Judge Michel agreed with the result in *Mitchell*, he was unwilling to accept the majority's position that a defendant waives his or her Fifth Amendment privilege "even as to facts that are not elements of the offense charged and as to which a defendant expressly 'reserved' in offering a plea."¹³⁹ Judge Michel therefore did not agree that the decision by Mitchell to leave the quantity of drugs involved for resolution at sentencing was fatal to Mitchell's claim.¹⁴⁰

Judge Michel acknowledged that a plea of guilt "waives the privilege as to all facts concerning the transactions alleged in the indictment."¹⁴¹ However, he questioned whether this same rule should apply in a circumstance such as Mitchell's, in which the amount of cocaine actually distributed is not an element of the crime of conviction.¹⁴² He was particularly troubled by the harshness of the penalty instituted for Mitchell's silence, namely that the mandatory minimum sentence was doubled from five to ten years of imprisonment.¹⁴³ Given these concerns, Judge Michel was confused about why, in this instance, the majority chose to tackle this complex Constitutional issue.¹⁴⁴ He thought the wiser course of action would have been to affirm the district court on the basis that Judge Cahn's error was harmless given the abundant evidence of Mitchell's involvement in the cocaine ring.¹⁴⁵ Nonetheless, with the majority decision on the books, an

138. See Joseph Slobodzian, *No Fifth at Sentencing: The Third Circuit Says Guilty Plea Nixes Immunity*, NAT'L L.J., September 22, 1997, at A4. The Honorable Paul R. Michel of the Court of Appeals for the Federal Circuit was sitting by designation on the three-judge panel that heard the *Mitchell* appeal. See *id.*

139. *United States v. Mitchell*, 122 F.3d 185, 192 (3d Cir. 1997) (Michel, J., concurring).

140. See *id.* ("And what if they had? Would the trial judge then have been obligated either to reject the plea or to refrain from relying on Mitchell's silence at all?").

141. *Id.*

142. See *id.*

143. See *id.*

144. See *Mitchell*, 122 F.3d at 192 (Michel, J., concurring) ("Given the unsettled state of the law among the Circuits on this important Fifth Amendment issue, I would defer a decision on it to a case in which deciding it is unavoidable and the briefs are more informative.").

145. See *id.* It is interesting to note that the brief filed by Mitchell's attorney, Steven A. Morley, before the Third Circuit did not really address the Fifth Amendment issue, since he believed reversal was in order because the sentence was unnecessarily harsh given the conflicting testimony offered by the government's own witnesses. It was only ten days before the hearing that Mr. Morley was informed that he was granted fifteen minutes for oral

analysis of what effect the denial of the Fifth Amendment privilege will have on due process is appropriate.

V. Due Process and the Effect of Denying the Fifth Amendment Privilege at Sentencing

Although the Third Circuit in *Mitchell* agreed that the Fifth Amendment conferred certain rights at sentencing, it did not believe these rights to include the right to remain silent about issues surrounding the crime of conviction.¹⁴⁶ The court was unwilling to recognize that an enhanced sentence resulting from the defendant's failure to testify constituted a penalty.¹⁴⁷ It claimed that this unwillingness was consistent with its decision in *Frierson*.¹⁴⁸

A careful reading of *Frierson*, however, reveals that this conclusion was not only incorrect but also was in direct contravention of Supreme Court precedent. *Frierson* was a "penalty" case brought under section 3E1.1 of the Guidelines, which provides for a two-level sentence reduction for acceptance of responsibility.¹⁴⁹ There, the court explicitly stated that "[t]he characterization of a denied reduction in sentence as a 'denied benefit' as opposed to a 'penalty' cannot be squared with the reality of the sentencing calculation and conflicts with decisions of the Supreme Court and pre-Guidelines decisions of this court."¹⁵⁰ Although there is some authority for the notion that a denied reduction is really a "denied benefit" rather than a penalty,¹⁵¹ the Third Circuit rejected this view.¹⁵²

Thus, it follows that if a denial of reduction is a penalty, then surely an increase in the sentence must also qualify as such. The Third Circuit stated that any other presumption would run afoul of Supreme Court precedent.¹⁵³ Notably, in *Minnesota v. Mur-*

argument, and that the court was "mainly interested in the Fifth Amendment issue." Telephone Interview with Steven A. Morley, Esq., attorney for Defendant Amanda Mitchell (Feb. 2, 1998).

146. See *Mitchell*, 122 F.3d at 191.

147. See *id.*

148. See *id.*

149. See *United States v. Frierson*, 945 F.2d 650, 658 n.4 (3d Cir. 1991).

150. *Id.* at 658.

151. See *United States v. Oliveras*, 905 F.2d 623, 627-28 (2d Cir. 1990).

152. See *Frierson*, 945 F.2d at 658.

153. See *id.* "The Supreme Court's Fifth Amendment penalty cases have never drawn such a distinction and their facts suggest the fallacy of doing so." *Id.*

phy,¹⁵⁴ the Supreme Court held that the government may not impose a penalty on a person for asserting the Fifth Amendment privilege.¹⁵⁵ Furthermore, the Supreme Court has held that “a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment privilege not to give incriminating testimony against himself.”¹⁵⁶

Clearly, the sentencing phase is when the punishment is administered, and therefore it is crucial that one’s due process rights survive in that phase.¹⁵⁷ This imperative is well illustrated in *United States v. Johnson*,¹⁵⁸ a First Circuit opinion. Although that case was decided before Congress enacted the Sentencing Guidelines, it stands for the proposition that subjecting oneself to further liability once the plea is entered is a valid reason for invoking the Fifth Amendment privilege.¹⁵⁹ Today, under the Guidelines, such a standard is even more important, as any new amount of drugs or contraband may either increase the sentence or negate the possibility of sentence reduction.¹⁶⁰ As the Supreme Court has stated: “The Fifth Amendment guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”¹⁶¹

VI. Conclusion

The right to withhold testimony for fear of self-incrimination is a constitutional safeguard built into our system of justice that serves to protect an individual’s fundamental rights and the concept of due process. Clearly, increasing the length of time a person will be incarcerated is a penalty and is precisely the type of situation for which the privilege was created. To dispose of the privilege at the

154. 465 U.S. 420 (1984).

155. *See id.* at 434 (“[i]t is clear that increasing a sentence for exercise of the privilege is a ‘penalty.’”).

156. *Frierson*, 945 F.2d at 658 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)).

157. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977). “Second, it is now clear that the sentencing process, as well as the trial, must satisfy the requirements of the Due Process Clause.” *Id.* at 358; *see also* *Murphy*, 465 U.S. at 426 (asserting that a defendant’s Fifth Amendment protection is not sacrificed by virtue of his conviction of a crime).

158. 488 F.2d 1206 (1st Cir. 1973).

159. *See id.* at 1209.

160. *See id.*

161. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

stage of the process when its protection is most necessary is contrary to the basic principles upon which our system of justice is based.

The Third Circuit unnecessarily delved into a constitutional analysis of an issue that could have been resolved under the doctrine of harmless error and did so in a very cluttered and disorderly fashion. In addition, it engaged in an incomplete analysis of the Fifth Amendment and thereby muddied the constitutional waters. While the result in *Mitchell* may in fact have been justified given the testimony offered at the sentencing hearing, there seems to be no support for the grounds on which the Third Circuit affirmed the conviction.

Conversely, the Tenth Circuit's opinion in *Garcia* is consistent with the fundamental rights guaranteed each citizen under the Constitution and with Supreme Court precedent. Additionally, in light of the changes brought about by the Sentencing Reform Act, the rule set forth in *Garcia* ensures that due process will not suffer. Our constitutional rights are intended to be interpreted expansively. In order to remain consistent with this intent, the Fifth Amendment's privilege against self-incrimination can not be deemed waived merely by a plea of guilt.

Todd A. Buchman